

NGUYEN (Migration) [2017] AATA 2492 (15 November 2017)

DECISION RECORD

DIVISION: Migration & Refugee Division
APPLICANT: Ms THI HOAI THU NGUYEN
CASE NUMBER: 1619706
DIBP REFERENCE(S): BCC2015/1477066
MEMBER: Michelle East
DATE: 15 November 2017
PLACE OF DECISION: Perth

DECISION: The Tribunal affirms the decision not to grant the applicant a Partner (Temporary) (Class UK) visa.

Statement made on 15 November 2017 at 4:51pm

CATCHWORDS

Partner (Temporary) (Class UK) visa – Subclass 820 (Partner (Temporary)) – No family members attended the wedding – No genuine spousal relationship – Pooling of the financial resources – Inconsistent evidence – Section 376 Certificates – Anonymous dob in of the applicant

LEGISLATION

Migration Act 1958, ss. 5F, 5F(2)(a)-(d), 65, 359AA, 376

Migration Regulations 1994, r 1.15A(3), Schedule 2 cl.820.211, 820.211(2)(a), 820.211(2), 820.211(7)-(9)

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision of a delegate of the Minister for Immigration on 18 November 2016 to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant applied for the visa on 22 May 2015 on the basis of her relationship with her sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner (Temporary)). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.820.211 because the delegate was not satisfied the applicant and her sponsor were in a genuine spousal relationship. A copy of the delegate's decision was attached to the application for review.
4. The applicant appeared before the Tribunal on 16 October 2017 to give evidence and present arguments. The Tribunal also received oral evidence from the applicant's sponsor. The Tribunal hearing was conducted with the assistance of an interpreter in the Vietnamese and English languages.
5. The applicant was represented in relation to the review by her registered migration agent.
6. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

7. The issue in the present case is whether the applicant is the spouse of the sponsor within the meaning of s.5F of the Act.

WHETHER THE PARTIES ARE IN A SPOUSE OR DE FACTO RELATIONSHIP

8. Clauses 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the spouse of the sponsor who is an Australian citizen.
9. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as husband and wife to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision.

ARE THE PARTIES VALIDLY MARRIED?

10. If the parties are validly married, they may meet the requirements of a spousal relationship, but not a de facto relationship. The Tribunal was provided with a copy of the parties' Marriage Certificate from the Registry of Births, Deaths and Marriages in Western Australia. The parties married on 28 November 2014. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2) (a).

ARE THE OTHER REQUIREMENTS FOR A SPOUSAL RELATIONSHIP MET?

11. The Tribunal has had regard to the evidence provided in relation to the financial aspects of the relationship, including joint ownership of assets and joint liabilities, the extent of any pooling of financial resources, any legal obligations owed by the other party and any sharing of the day to day household expenses.
12. The applicant has provided several statements from her ANZ Access account for various periods dating from January 2015 to March 2017. A review of these statements indicates transfers and deposits from 'Vinh Nguyen' some of which are quite substantial. For example, on 27 January 2015 there is a deposit of \$7000. A subsequent entry on the statement two days later indicates that cheque was dishonoured. A subsequent transfer of the same amount a day later was made. The payments from this source are not consistent and are of varying amounts and frequency.
13. The Tribunal questioned the applicant who Vinh Nguyen was and what the payments were for. The applicant advised she refers to Vinh Nguyen as her 'uncle' however he is not a biological relative, but a family friend. When she first moved to Australia she lived with him until she got married and worked for him until February 2017. She said her working hours were irregular and he paid her intermittently. The Tribunal commented on one payment of \$7000 and the applicant said she was growing chillies on his property and that was her share of the profit from the sale.
14. Several transfers of money to another account X5702 were also noted. The Tribunal questioned the applicant which account this was and in whose name it was held. The applicant said this was her own account and she did transfers between her various accounts.
15. The parties have also produced evidence of their joint savings account with Westpac in 2016 and a further joint account opened in January 2017. This latter account shows regular deposits of money from 'Blue Bells' and 'Vinh Nguyen'. The Tribunal questioned the applicant if this was payment for her salary. She said it was and she was now only working for Blue Bells who packed herbs for major supermarket chains. The account also reflects regular everyday household eftpos transactions.
16. Other than the joint accounts, very little financial evidence from the sponsor was provided prior to the hearing. The Tribunal questioned the sponsor as to his financial details and requested copies of his bank statements dating back to 2014. The sponsor's evidence was that he worked as a powder coater and was paid fortnightly. Both parties gave consistent answers with each other insofar as it related to their work and salaries.
17. The sponsor provided copies of his bank statements for two accounts he holds with the Commonwealth Bank dating from 2014 to June 2017. A review of the statements reflects the regular deposit of his salary into his own account. This account shows everyday transactions such as petrol and fast food purchases. The other account is a goal saver account and the statements reflect regular transfers to and from this account and the

sponsor's other personal account. The statements provided dovetail into the statements provided for the joint account with the sponsor's salary then being deposited into the joint account from mid 2017.

18. Both parties attested their salaries are paid into their joint account and all bills are paid from that account. Prior to that they said they maintained separate bank accounts but each contributed to the bills from their own earnings.
19. Upon reviewing the parties' joint account opened this year, it demonstrates regular deposits of the applicant's salary but no record of any transactions such as the sponsor's salary as he attested to in his oral evidence until mid June 2017.
20. Whilst the Tribunal acknowledges the parties have opened a joint account earlier this year, their oral evidence is consistent with them maintaining separate finances until that time. Indeed, until June 2017 it is unclear how the sponsor has contributed financially and the Tribunal found their answers vague and lacking any detail. Having reviewed the sponsor's own bank statements his salary appears to have been used for eftpos transactions for himself and large cash withdrawals.
21. The Tribunal questioned the parties as to how their expenses such as utilities and rent were paid. Both the applicant and the sponsor advised they paid rent to the sponsor's sister who owned the property and paid for utilities separately.
22. Evidence of joint liabilities such as house and contents insurance and car insurance were provided. The applicant has been nominated as the beneficiary on the sponsor's superannuation statement and a letter dated 6 October 2017 has been provided from their accountant regarding their taxation details and why the applicant was not declared on the sponsor's 2015 tax return.
23. Whilst the Tribunal acknowledges some pooling of financial resources and shared responsibility for household bills this does not necessarily indicate a genuine spousal relationship.
24. The Tribunal has had regard to the evidence provided in relation to the nature of the household including the parties' living arrangements, the caring of any children and any sharing of housework.
25. Evidence provided to the Tribunal in the form of a statutory declaration from the sponsor's sister is the applicant and her sponsor live together in the sister's house together with a third person, who is a friend of the sponsor. The sponsor in his oral evidence said he had owned the house until last year and transferred it to his sister at that time because he was unable to maintain the mortgage payments.
26. The parties' evidence is they have lived together since the day after they married. Several independent pieces of correspondence have been provided to the parties both jointly and individually reflecting their residence at the same address until the current date.
27. The parties' evidence about how the household runs is the applicant cooks and cleans. The applicant also spoke about their large land area and how she likes to grow vegetables. She described in detail which vegetables she grew and how her husband doesn't like to eat them but she eats them herself. The sponsor gave consistent evidence that his wife does the cooking and cleaning but said their house mate does the gardening and likes to grow his own vegetables. He said his wife does not do any gardening and denied she grew her own vegetables.

28. This inconsistency in the oral evidence was put to the applicant pursuant to section 359AA of the Act and an opportunity to provide further submissions in response was provided. Those submissions were received on 30 October 2017. In response to this inconsistency, the representative submitted that, 'We submit that in the broad scope of the entirety of the evidence – both documentary and oral – before the Member, this inconsistency is not significant and ought not to be given any significant weight in the Member's consideration. We submit that such a disagreement on household work is not uncommon or exception in a spousal relationship, as partners often disagree on 'who does what' in their household. Further, in the history of a 3-year relationship it is reasonable to expect that they had both undertaken the responsibilities of gardening but each focus on different times during which they believed only they did any gardening work'. (sic)
29. The Tribunal readily acknowledges that spouses will often have inconsistencies in their evidence particularly in relation to household duties. This is often done by one party to make themselves appear more involved in the housework than they really are. With all due respect to the representative, this was not the situation here. The applicant gave very clear evidence about how she loves to garden and grow her own vegetables. Her evidence was specific and detailed. It wasn't her giving her account of who did what chores – she was describing what she likes doing more like in the nature of a hobby. The sponsor's evidence directly contradicted that of the applicant's in such a way that indicates little understanding of her daily habits and hobbies. The Tribunal does not accept this explanation regarding the inconsistency and places significant weight on it.
30. This blatant inconsistency on the oral evidence between the applicant and her sponsor on what appeared to be something the applicant enjoyed doing causes the Tribunal to have doubts about the parties' credibility such that would give rise to doubts about the genuineness of their relationship.
31. The Tribunal has had regard to the evidence provided as to whether the parties represent themselves to other people as being married to each other, the opinion of the parties' friends and acquaintances about the nature of the relationship and any basis on which the parties plan and undertake joint social activities.
32. The Tribunal was provided with a substantial number of statutory declarations from friends and family members of both the applicant and her sponsor all attesting to their knowledge of and belief in the genuineness of the parties' relationship. These declarations are from both the Vietnamese and non-Vietnamese community. The Tribunal was also provided with photos of the parties together in a variety of social settings both by themselves and with other people including their recent travel to NSW to see the sponsor's family.
33. Of interest to the Tribunal was the very small size of the parties' wedding. Even though it had been explained in statutory declarations, the Tribunal questioned each party about who attended the wedding and why there was no representation from either party's immediate family members. The Tribunal notes that Vietnamese weddings are generally a large event and have cultural significance in their community, particularly when the couple are young such as in this case and it is their first marriage.
34. The parties said they didn't have an engagement party, instead deciding to just get married. The applicant said her family didn't attend because they were in Vietnam and the sponsor said his mother and sisters were living in Sydney. The Tribunal questioned the sponsor why his family couldn't simply come from Sydney for the wedding and he responded they were 'busy'. Furthermore, the parties visited Sydney in September 2017 and this was the first time the applicant had met her sponsor's mother despite being married for nearly 3 years and being together since late 2013.

35. The Tribunal asked the parties separately who attended the wedding. The applicant said she had 7 friends all of whom she had met since she came to Australia and the sponsor said he only had his friend, Mr Truong who also lives with them. The sponsor said he had no other friends in Perth.
36. The Tribunal also questioned the sponsor whether his father had passed away as there is no reference to him in his sister's statutory declaration and no mention of him in any of the documentation. The sponsor said his parents had separated in about 1986. He then said his sisters were born in 1990 and 1996. The Tribunal asked whether they had a different father and the sponsor said they all had the same father.
37. The Tribunal has significant concerns about the lack of social recognition of the applicant's wedding to her sponsor and finds the parties' explanation regarding this to be vague and unconvincing. The Tribunal finds this casts doubt on the genuineness of the parties' relationship.
38. The Tribunal has had regard to the evidence provided in relation to the nature of the parties' commitment to one another including the duration of the relationship, the length of time they have lived together, the degree of companionship and emotional support they draw from each other and whether they see the relationship as long term.
39. The parties' evidence is they met at the applicant's birthday party on 20 November 2013. The sponsor was there as a friend of Mr Truong who had been invited by Vinh Nguyen to the celebration. They said they started dating and just decided to get married on 28 November 2014, moving in together the day after.
40. The applicant arrived in Australia on 18 July 2013 on a Subclass 573 student visa. This visa does not expire until 15 March 2018.
41. The Tribunal questioned the parties as to their future plans, including whether they intended having children. Both the applicant and the sponsor gave consistent answers as to how many children they would each like. The applicant disclosed she had had a pregnancy terminated early 2015 as she said they weren't yet ready to have children. Medical evidence was provided to the Tribunal subsequent to the hearing regarding the termination.

42. Section 376 Certificates

43. The Tribunal has been provided with two Certificates issued by the Department of Immigration and Border Protection dated 27 March 2017 and 26 July 2017. Both Certificates relate to non-disclosure of information provided in confidence to the Department.
44. As the information contained adverse information that would be the reason or part of the reason for affirming the decision under review the information was put to the applicant pursuant to section 359AA of the Migration Act. The information related to two anonymous dob ins which indicated the marriage may have been contrived in order to obtain a visa. Furthermore, it was suggested the applicant paid the sponsor to marry her in order to obtain a permanent visa.
45. The representative was provided with a copy of each certificate and submissions were invited in relation to its validity. Those submissions were received on 30 October 2017.
46. A further Certificate issued by the Department of Immigration and Border Protection was provided to the Tribunal after the hearing. Once again it related to non-disclosure of information provided in confidence to the Department. The Tribunal was of the view that the information subject to the Certificate had no relevance to the decision under review. The

applicant was notified as to the existence of the Certificate but the Tribunal, after careful consideration has had no regard to the information provided which was subject to the non disclosure Certificate.

47. The applicant provided a statutory declaration dated 26 October 2017 addressing the adverse information put to her pursuant to section 359AA of the Act. She resolutely refutes the suggestion that her relationship with her husband was contrived and outlines who she thinks is responsible for the anonymous dob-ins and their motivation for their actions.
48. The Tribunal has carefully considered the information which was subject to the section 376 Certificates dated 27 March and 26 July 2017 and the applicant's response by way of statutory declaration.
49. Information provided with anonymity and not subject to independent probative evaluation is at best untested and at worst untrue.
50. The Tribunal is unable to place any weight on the information subject to the non disclosure certificates. The Tribunal finds it lacks any probative value and as such has had no regard to it in making its decision.
51. The Tribunal has considered the above evidence, inconsistencies in the evidence and explanations provided by the parties.
52. The Tribunal finds the parties know each other, live together and share some aspects of their daily lives. The Tribunal acknowledges there has been some pooling of the financial resources, however until earlier this year the parties appeared to operate quite independently.
53. The Tribunal however is not satisfied that the social aspects of the relationship are consistent with a genuine and continuing relationship. There is very little social recognition of the relationship, with no family from either side attending their wedding. The sponsor, despite living and working in Perth for several years claims he has not made any friends other than his housemate which is why he had no friends of his own present at the wedding. The applicant only visited the sponsor's family for the first time 3 years after they married.
54. Whilst there are a number of statutory declarations provided by both the Vietnamese and non-Vietnamese community attesting to their relationship, the Tribunal places significant weight on the non attendance of the parties' families at their wedding and the lack of any traditional celebration. The parties were unable to explain in their oral evidence why they did this and whilst the Tribunal may accept the applicant's family couldn't afford to travel to Australia, it cannot accept the reasons for the sponsor's family's non attendance, that is they were too busy.
55. The Tribunal has further concerns about the inconsistencies which arose on the oral evidence in relation to the applicant's gardening. Their oral evidence was directly inconsistent with each other and the explanation provided, in submission and not in statutory declaration form was insufficient to satisfy the Tribunal. The Tribunal has placed significant weight on this factor.
56. Whilst the parties appear to have lived together for a length of time there was little evidence to support a finding that they provide companionship to each other and particularly, that they draw emotional support from each other.
57. After considering the available evidence the Tribunal is not satisfied that there is a mutual commitment to a shared life together to the exclusion of all others, the relationship is

genuine and continuing and the parties live together or not separately and apart on a permanent basis.

58. Given these findings the Tribunal is not satisfied that at the time the visa application was made the parties were in a spousal relationship.
59. On the basis of the above the Tribunal is not satisfied that the requirements of s.5F(2) are met at the time the visa application was made and at the time of this decision.
60. Therefore the applicant does not meet cl.820.211(2).
61. No claim has been made and there is no evidence to suggest the alternative criteria contained in cl.820.211(7),(8) and (9) apply.
62. For the reasons above, the applicant does not satisfy the criteria for the grant of the visa.

DECISION

63. The Tribunal affirms the decision not to grant the applicant a Partner (Temporary) (Class UK) visa.

Michelle East
Member

ATTACHMENT - EXTRACT FROM MIGRATION REGULATIONS 1994

1.15A SPOUSE

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).